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No. 83-850

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES CONNORS KARO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

VINCENT L. GAMBALE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether warrantless installation of a beeper inside a container of chemicals with the consent of the original owner violates the Fourth Amendment rights of a suspect in a drug manufacturing scheme to whom the container is subsequently transferred.

2. Whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other private area, such as a commercial storage locker.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Richard Miles Horton, William Robertson Harley, Michael Gaylord Steele, Evan Roth and Gene R. Rhodes were parties to the proceeding in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 710 F.2d 1433. The district court's oral ruling granting respondents' joint suppression motion (J.A. 155-158) is not reported. The memorandum opinion of the district court denying the government's motion for reconsideration (Pet. App. 16a-22a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a) was entered on June 20, 1983. A petition for

rehearing was denied on August 26, 1983 (Pet. App. 24a). Justice White extended the time within which to file a petition for a writ of certiorari to and including November 24, 1983. The petition was filed on November 22, 1983, and was granted on January 16, 1984 (J.A. 159). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

In an indictment filed in the United States District Court for the District of New Mexico, respondents were charged with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Respondents Horton, Harley, Steele and Roth were also charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). In addition, the indictment charged respondent Karo with possession of cocaine with intent to distribute it and distribution of cocaine, both in violation of 21 U.S.C. 841(a)(1). J.A. 32-34.

1. Prior to trial, respondents filed a joint motion to suppress evidence seized in a warrant-authorized search of a house in Taos, New Mexico. J.A. 35-41. Respondents contended that the search warrant for the Taos residence was invalid because it was based

on information derived from allegedly unlawful beeper surveillance.

The evidence at the suppression hearing showed that on March 3, 1980, in Albuquerque, New Mexico, Drug Enforcement Administration (DEA) agents conducted a judicially authorized search of a storage locker rented by Richard Logan and discovered laboratory equipment, glassware and chemicals used to manufacture amphetamine. Some of the boxes containing laboratory equipment and chemicals bore shipping labels addressed to Carl Muehlenweg of Graphic Photo Design in Albuquerque. J.A. 69-70, 114-115, 150. Approximately six weeks later, DEA agents executed search warrants at Graphic Photo Design, which turned out to be Muehlenweg's residence, and at T & M Research, where Muehlenweg worked. At those locations, the agents discovered invoices and statements reflecting that Muehlenweg had ordered and obtained laboratory glassware and chemicals that had been found in Logan's locker. J.A. 70, 112.

Shortly thereafter, Muehlenweg acknowledged to the DEA that Logan had ordered chemicals and laboratory glassware through him, and he agreed to become a DEA informant. J.A. 67, 100, 114, 151.[1] Muehlenweg also apprised the agents that he had previously ordered ether for respondents Karo, Horton, and Harley for their use in the production of cocaine. In late August 1980, Muehlenweg told DEA Agent Richard Rottinger that he had ordered a 50-gallon shipment of ether for Karo, Horton, and Harley,

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[1] A few weeks later, after being tipped off by Muehlenweg, agents observed Logan pick up chemicals and equipment from Muehlenweg, but Logan shot and killed himself when the agents moved in to arrest him (J.A. 89, 100, 115, 151-152).

which they planned to use to extract cocaine from clothing that had been imported into the United States. J.A. 99-103, 118, 122-123, 140. Agent Rottinger confirmed that Muehlenweg had ordered and paid for ten five-gallon cans of ether from BWR Scientific, Inc., for delivery in September 1980. J.A. 70-72, 107-109.

Prior to the arrival of that shipment, the government obtained a court order authorizing the installation and monitoring of a beeper[2] in one of the cans of ether that had been ordered by Muehlenweg.[3]

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[2] "A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), slip op. 1.

[3] The affidavit in support of the application for the beeper authorization order falsely indicated that Muehlenweg was a target of the DEA investigation relating to the ether shipment, and did not state that he was cooperating with the DEA as a confidential informant (J.A. 43-44). According to the testimony of the prosecutor involved, the affidavit was drafted in that manner in order to preserve Muehlenweg's usefulness as a confidential informant and to protect his safety in the event the targets of the investigation obtained copies of the warrant application. J.A. 130-133, 139. The prosecutor was concerned that the targets might ultimately obtain the application if the district court adopted target notification procedures analogous to those contained in the federal wiretap statute, 18 U.S.C. 2518(8)(d) (J.A. 133-134). The prosecutor and Agent Rottinger testified, however, that at the time the application was made, the prosecutor orally advised the issuing judge that Muehlenweg was actually cooperating in the investigation, and that he explained to the judge that that information had been omitted from the warrant application to preserve Muehlenweg's confidential informant status (J.A. 127, 133, 137-138).

With Muehlenweg's permission, the DEA picked up the shipment from the common carrier, substituted a can containing a beeper for one of the cans in the shipment, repainted the cans so that they would all look alike, and then delivered them to Muehlenweg's residence. J.A. 72-75. ~~H. Tr. 48-54.~~ On September 20, 1980, agents observed respondent Karo pick up the ether from Muehlenweg's house and, using visual and beeper surveillance, followed Karo as he transported the ether in Muehlenweg's automobile to his residence. Still under surveillance, Karo then returned the automobile to Muehlenweg's residence. Pet. App. 4a; J.A. 53-54, 75-76, 120.

By monitoring the beeper later that day, the agents ascertained that the ether had been transferred to the vicinity of respondent Horton's house. The ether's presence at that location was confirmed by a DEA agent who walked along the sidewalk and smelled the odor of ether emanating from Horton's residence. Pet. App. 4a-5a; J.A. 54, 76, 120-121. Subsequent monitoring of the beeper two days later, on September 22, 1980, revealed that the ether had been moved to the home of Horton's father. The following day, the agents traced the ether by means of the beeper to a commercial self-storage facility in Albuquerque. The beeper did not enable the agents to identify the particular locker that contained the chemical; however, the agents detected the odor of ether emanating from locker 143 and ascertained that respondents Horton and Harley had rented that locker. On October 8, 1980, the agents obtained an order authorizing installation of an entry tone alarm in that locker. During installation of the alarm on the following day, the agents saw the cans of ether inside the locker. The alarm malfunctioned, however, and

the agents did not learn that the ether had been removed by respondent Horton until October 16, 1980, when they were so notified by the manager of the storage facility. Pet. App. 5a; J.A. 54-55, 76-78, 80-86, 121-122, 128.

Three days later, on October 19, the agents picked up the beeper signal at another self-storage facility in Albuquerque. With the permission of the storage facility's manager, the agents installed a closed circuit video camera that was focused on the door of locker 15, which had been rented under an alias by respondents Horton and Harley. On December 31, 1980, agents monitoring the camera observed Horton and Harley enter the locker, and on February 6, 1981, they observed respondent Rhodes and an unidentified woman remove the cans of ether and load them into Horton's pickup truck. By means of both visual and beeper surveillance, agents followed the truck to Rhodes's residence, where it was parked in the driveway. Pet. App. 5a-6a; J.A. 55-57, 86-94, 96-97, 110-111.

Later that day, DEA agents followed the truck containing the ether to a residence in Taos, New Mexico rented by respondents Horton, Harley, and Steele. During their surveillance of the Taos residence, the agents monitored the beeper to determine its continued presence at the house. Pet. App. 6a; J.A. 57-58. Relying on information obtained in the course of their investigation, including information derived through the use of the beeper regarding the various locations to which the ether had been transported, the agents secured a search warrant for the Taos residence (J.A. 46-47). On February 10, 1981, the warrant was executed, cocaine and laboratory equipment were seized, and respondents Horton, Harley, Steele,

and Roth were arrested. Pet. App. 6a; J.A. 48, 63, 65. The ether thus had been moved to seven different locations over a period of four and a half months before respondents were finally ready to put it to its intended illicit use.

2. The district court granted respondents' motion to suppress the evidence seized at the Taos residence (Pet. App. 25a). The court concluded that the order authorizing the installation of the beeper was invalid because the government had made deliberate misrepresentations in the warrant application, and that the evidence in question was the fruit of the improperly authorized beeper surveillance (J.A. 155-158). Thereafter, the district court denied the government's motion to reconsider its suppression ruling, rejecting the argument that the installation and monitoring of the beeper did not require a warrant (Pet. App. 16a-22a, 26a).

3. On appeal, the government did not challenge the district court's finding that the order authorizing the beeper was invalid (Pet. App. 3a). Rather, the government contended that the Fourth Amendment does not require a warrant for the installation and monitoring of a beeper, that the defendants lacked "standing" to contest the use of the beeper, and that the evidence seized pursuant to the search warrant for the Taos residence was not the "fruit" of the beeper surveillance.

The court of appeals affirmed the suppression order except as to respondent Rhodes (Pet. App. 1a-15a).[4] At the outset, the court rejected the argument

[4] The court held that Rhodes, who transported the ether from Albuquerque to Taos, failed to establish that his legitimate expectations of privacy had been violated by the beeper surveillance or the search of the Taos residence (Pet. App. 14a-15a).

that the defendants could not have had any legitimate expectations of privacy in the can of ether because the ether was intended for use in the manufacture of contraband (*id.* at 3a-4a). The court then concluded (*id.* at 6a-9a) that respondent Karo's Fourth Amendment rights were violated at the time he picked up the can of ether from Muehlenweg because the installation of the beeper in the can had not been authorized by a valid warrant. The court explained (*id.* at 7a-9a (footnotes and citation omitted)):

> Although the physical installation of the beeper in the can takes place before the new owner picks it up, we believe an intrusion occurs at the time the item comes into his possession. All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken, including inside private residences and other areas where the right to be free from warrantless government intrusion is unquestioned. * * * The installation of a beeper on an item of personal property gives the government the capability of tracing every movement of the object on which the beeper is placed. * * * We believe that individuals have a reasonable and legitimate expectation that the government will not engage in such activity without the protections afforded by resort to the judicial process. Thus, regardless of the consent obtained when the beeper is physically installed, an infringement of the new owner's Fourth Amendment rights begins at the time the object comes into his control. The consent of the owner

> to have a beeper installed cannot suffice to continue the installation once the item belongs to someone else any more than the consent of a previous owner of a suitcase could suffice to permit the police to periodically open and search the suitcase after it comes under the ownership of another.

The court of appeals also held that the monitoring of the beeper without a valid warrant violated the Fourth Amendment (Pet. App. 9a-11a). It sought to distinguish this Court's decision in *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), on the following grounds: that here the beeper was monitored while the can was inside private premises and storage lockers, whereas in *Knotts* the beeper was never monitored while it was inside a residence; that, unlike in *Knotts*, the monitoring here gave the agents information they could not have discovered even by constant visual surveillance; that the surveillance in *Knotts* lasted only a short time, whereas here it covered a five-month period; and that here, unlike in *Knotts*, the officers lost track of the can for substantial periods of time and much of the tracing of the ether to new locations was possible only by use of the beeper. Pet. App. 9a-10a. The court concluded (*id.* at 10a) that "the warrantless use of a beeper to monitor the location of noncontraband withdrawn from public view inside private residences or similarly protected places is an unconstitutional search or seizure."[5]

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[5] Rejecting the argument that the evidence seized pursuant to the search warrant for the Taos residence was not the fruit of any illegal beeper surveillance, the court of appeals found a direct link between the beeper monitoring and the information that the ether was at the Taos residence (Pet. App. 11a-12a). The court noted (*id.* at 14a n.6) that even

SUMMARY OF ARGUMENT

I

The court of appeals held that the warrantless installation of a beeper inside a container violates the Fourth Amendment rights of a subsequent owner (such as respondent Karo) to whom the container is transferred. The court did not actually conclude—nor could it—that the physical act of placing a beeper inside a container with the consent of the original owner infringes the new owner's legitimate privacy interests. Instead, the court reasoned that the continued presence of the beeper inside the container after its transfer to the new owner is a search or seizure within the contemplation of the Fourth Amendment because the beeper "gives the government the capability of tracing every movement of the object on which the beeper is placed" (Pet. App. 7a).

This holding is wholly untenable. The applicability of the Fourth Amendment to a particular law

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though there were breaks in the monitoring between the initial delivery of the ether to Karo and the tracking of the ether to Taos, there was no break between the monitoring of the beeper while it was in the second storage locker and its transfer to the Taos residence.

In addition, the court rejected the argument that respondent Roth (who was a visitor at the Taos residence and had stayed there for several days prior to the search) and Karo (who had no connection with that residence, but whose rights allegedly were infringed by the installation of the beeper) lacked "standing" to seek suppression of the evidence (Pet. App. 13a-14a).

We have not raised these fruits and "standing" issues in this Court. We note, however, that rejection of the court of appeals' holding on the installation issue would establish that there was no violation of respondent Karo's Fourth Amendment rights and require reversal of the judgment in his favor. See pages 17-23, *infra*.

enforcement action turns on whether that action has infringed the legitimate expectations of privacy of the person challenging it. See, *e.g.*, *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983); *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 10-11; *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983). It is clear that the intrusion, if any, into legitimate privacy expectations occasioned by beeper surveillance occurs only when signals from a beeper are monitored to ascertain the location of the container in which it has been installed. The beeper's mere presence inside the container, without more, provides no information whatever, and thus effects no intrusion into the new owner's privacy interests.

II

The court of appeals also held that the warrantless monitoring of the beeper while it was located inside private premises violated respondents' Fourth Amendment rights. In reaching this result, however, the court disregarded the fact that the only information conveyed by a beeper—*viz.*, its present location—intrudes minimally, if at all, upon protected privacy interests. The limited nature of the information disclosed by a beeper is of critical importance in determining whether the use of the beeper in the circumstances of this case implicated the Fourth Amendment and, if so, whether the beeper surveillance was reasonable under the Fourth Amendment.

A. This Court's decision in *Knotts* establishes that the use of a beeper to monitor the movement of a container from one location to another does not disclose information as to which there is a legitimate expectation of privacy, even though each location may itself be private premises, because the actual move-

ment—which is all that the beeper reveals—takes place over public roads and thus is subject to discovery through visual surveillance. Moreover, when monitored from a distance (which is often the case as agents seek to avoid detection), a beeper discloses only that it is somewhere in the vicinity of a particular structure, without revealing whether it has been taken inside. And even when a beeper does disclose its presence inside private premises, it tells nothing about the interior of those premises other than the fact that it is there. Whether the suspects take the beeper-laden container inside private premises, as here, or leave it outside, as in *Knotts*, the information garnered by monitoring the signal is the same: that the container has been taken to a particular location. This case and *Knotts* are therefore analytically indistinguishable.

B. The Fourth Amendment imposes two separate requirements on law enforcement activities. First, the Amendment declares that the right to be free from unreasonable searches and seizures shall not be violated. Second, the Amendment states that all warrants must be supported by probable cause and must particularly describe the place to be searched and the persons or things to be seized. Assuming the applicability of the Fourth Amendment to use of a beeper such as was made in this case, it remains necessary to decide what level of information is required to render the "search" affected by a beeper reasonable, and whether, if probable cause is required, it is nevertheless reasonable to conduct such surveillance without first procuring a warrant.

1. It is our submission that if the monitoring of a beeper be deemed a "search," it is so minimally intrusive into legitimate privacy interests, and at the

same time so useful to enforcement of the laws, that it is reasonable under the Fourth Amendment when employed by officers possessing a reasonable suspicion of criminal activity. This Court has recognized that certain law enforcement actions that qualify as Fourth Amendment searches and seizures nevertheless are not so intrusive as to require probable cause. See, *e.g.*, *Michigan* v. *Long*, No. 82-256 (July 6, 1983); *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983). In determining the reasonableness of such actions in particular contexts, the Court has balanced the public interest against the individual's Fourth Amendment interest.

In the context of this case, because the societal concern for drug abuse and the effectiveness of beepers as an aid to drug law enforcement outweigh the limited intrusion on privacy interests occasioned by the use of a beeper, use of this investigative technique is reasonable on less than probable cause. The public interest in investigating and uncovering unlawful drug activity is substantial, if not compelling, and the difficulties of law enforcement are particularly acute in the context of unlawful drug manufacturing ventures such as the clandestine drug laboratory in this case. On the other hand, the use of a beeper, which conveys only a narrow piece of information (its present location), constitutes a sharply limited invasion, if any, on an individual's legitimate privacy interests. In this respect a beeper "search" is dramatically different from a conventional search of the kind that must be justified by probable cause.

2. If reasonable suspicion is sufficient to justify use of a beeper, it follows that the Fourth Amendment does not require a warrant, which may be issued only on probable cause. Even if probable cause is re-

quired before beeper surveillance may be undertaken —and probable cause was clearly present here—the court of appeals erred in imposing a warrant requirement.

Neither the language nor the history of the Fourth Amendment reflects any intention to require warrants as a condition to a lawful search or seizure. Nevertheless, the Amendment does require that searches and seizures be reasonable, and this Court has held that most types of searches may not ordinarily be deemed reasonable unless authorized by a warrant issued by a neutral and detached magistrate and satisfying the prerequisites of the Warrant Clause of the Fourth Amendment. But exceptions to the warrant requirement have been recognized in certain situations in which, after balancing the intrusion into individual privacy interests against societal law enforcement interests, the Court has concluded that the costs of obtaining a warrant outweigh the justifications for seeking antecedent judicial control of the search.

In short, the issue whether a particular type of search must be supported by a warrant in order to be reasonable under the Fourth Amendment cannot be decided without consideration of the magnitude of the individual privacy interest implicated. Given the extremely limited intrusion into legitimate privacy expectations entailed by the monitoring of a beeper, which is not comparable to the intrusions that accompany traditional searches, we submit that the reasonableness of beeper monitoring should not turn on whether it was authorized by a warrant. Indeed, the policies served by a warrant in protecting the interests of the individual against unreasonable governmental intrusion have little, if any, application in the beeper context. The availability of post-search judi-

cial review is adequate to control potential abuses arising from the slight intrusion entailed by beeper surveillance.

ARGUMENT

Last Term, in *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), this Court held that the use of a beeper by law enforcement officers to trace a can of chemicals from its place of purchase in Minneapolis to the defendant's residence in a secluded area of Wisconsin did not violate the defendant's legitimate expectations of privacy and thus did not constitute a "search" or "seizure" within the meaning of the Fourth Amendment. The officers in *Knotts* arranged with the chemical company to have the chemicals placed inside a can containing a beeper prior to delivery to one of Knott's confederates. The can was transferred to a second confederate, Petschen, who transported it in his automobile over public roads. By monitoring the beeper's signals, the officers were able to ascertain that the can of chemicals had come to rest on Knotts' property.

The Court in *Knotts* recognized that cases involving the permissibility of beeper use ordinarily raise two distinct issues, one relating to the installation of the beeper in a package or conveyance, the other relating to the monitoring of signals transmitted by the beeper. The Court did not pass on the installation issue, however, because Knotts did not challenge the warrantless installation of the beeper in his case. *Knotts*, slip op. 3 n.*; see also *id.* at 1 (Brennan, J., concurring); *id.* at 1 (Stevens, J., concurring). As to the monitoring issue, the Court concluded that, because visual surveillance from public places would have sufficed to reveal to the police the same information disclosed by the beeper—*viz.*, that Petschen's automobile carrying

the can of chemicals had arrived on Knotts' property —Knotts could claim no legitimate expectation of privacy with respect to that information and thus he could not invoke the protections of the Fourth Amendment.

In this case, the agents obtained a warrant authorizing the installation and monitoring of a beeper in a can of chemicals prior to delivery to respondent Karo. Because the district court held the beeper warrant invalid and the government did not challenge that holding on appeal, the validity of that warrant is not before the Court. Accordingly, the beeper surveillance should be viewed as if it had been undertaken without a warrant. So viewed, the questions for decision are whether the warrantless installation and monitoring of the beeper violated respondents' Fourth Amendment rights in the circumstances of this case.

In the decision under review, the court of appeals held that the warrantless installation of a beeper in a container with the consent of the original owner amounts to a search or seizure that infringes the new owner's Fourth Amendment rights at the time the container comes into his possession. The court also held that the warrantless monitoring of a beeper's signals violates the Fourth Amendment whenever, at the time of monitoring, the container in which the beeper has been installed is situated inside a home or other "private" area. This approach, under which the limited kind of information acquired through use of a beeper is treated no differently from the search of a home, trivializes the values underlying the Fourth Amendment and offends the central policy of reasonableness by which searches and seizures are intended to be regulated. For the reasons set forth below, we contend that both of the court's holdings are in error.

I. THE CONSENSUAL INSTALLATION OF THE BEEPER DID NOT VIOLATE RESPONDENTS' FOURTH AMENDMENT RIGHTS

Beepers are principally used by law enforcement authorities in drug investigations to uncover illegal trafficking and manufacturing schemes. For example, beepers have enabled government agents to apprehend airborne drug smugglers, to monitor controlled deliveries of packages containing contraband, or, as in this case and *Knotts*, to locate clandestine drug laboratories. Agents have installed beepers on or in conveyances, such as airplanes or automobiles, and inside packages, including those that contain contraband and those containing noncontraband chemicals used to manufacture illegal drugs.

This case is typical of those cases involving the installation of a beeper in a can of noncontraband chemicals. The agents first prepared a can by installing a beeper in it, and then, with informant Muehlenweg's permission, they substituted their own beeper-laden can for one of the cans in the shipment. In our view, neither the physical act of attaching a beeper to a container nor the subsequent act of placing chemicals in the beeper-laden container constitutes a search or seizure at all, at least with respect to a purchaser (such as respondent Karo) to whom the container is subsequently transferred, because neither act intrudes upon any legitimate expectation of privacy that such a purchaser may have. At the time of the installation in this case, the DEA agents already knew that Muehlenweg had ordered ten five-gallon cans of ether on behalf of respondents Karo, Horton, and Harley. By taking Muehlenweg into their confidence, these respondents had assumed the risk that Muehlenweg would convey that information to others, including

the government. See *Smith* v. *Maryland*, 442 U.S. 735, 743-744 (1979) (and cases cited). And the process of pouring a quantity of ether from one of the cans in the shipment into the DEA's own beeper-laden can provided the agents with no additional information that respondents could have wished to keep private.

Moreover, even if the installation of a beeper in these circumstances could be classified as a search or a seizure, there can be no serious Fourth Amendment claim where, as here, the installation is undertaken with the consent of a person having lawful dominion and control over the container. See *United States* v. *Matlock*, 415 U.S. 164, 169-172 (1974); *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969). Here, Muehlenweg apparently was designated by Karo, Horton, and Harley to order the ether, to pick up the shipment from the common carrier, and to store the ether at his residence until Karo could come by for it. Thus, it is clear that Muehlenweg had a "sufficient relationship" to the property (*United States* v. *Matlock*, 415 U.S. at 171) to consent to the installation of the beeper.[6]

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[6] We note that several courts of appeals have approved warrantless beeper installations in circumstances similar to those of this case. See *United States* v. *Brock*, 667 F.2d 1311, 1319 n.4 (9th Cir. 1982), cert. denied, No. 81-6922 (Mar. 7, 1983); *United States* v. *Bailey*, 628 F.2d 938, 943 (6th Cir. 1980); *United States* v. *Bernard*, 625 F.2d 854, 860 (9th Cir. 1980); *United States* v. *Lewis*, 621 F.2d 1382, 1388 (5th Cir. 1980), cert. denied, 450 U.S. 935 (1981); *United States* v. *Bruneau*, 594 F.2d 1190, 1194 (8th Cir.), cert. denied, 444 U.S. 847 (1979); *United States* v. *Miroyan*, 577 F.2d 489, 493 (9th Cir.), cert. denied, 439 U.S. 896 (1978); *United States* v. *Cheshire*, 569 F.2d 887, 889 (5th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Curtis*, 562 F.2d 1153, 1156 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); *United States*

The court of appeals in this case did not hold otherwise. Indeed, the court acknowledged that "[b]efore Karo took control of the ether, the can with the beeper

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v. *Abel*, 548 F.2d 591, 592 (5th Cir.), cert. denied, 431 U.S. 956 (1977); *United States* v. *Hufford*, 539 F.2d 32, 34 (9th Cir.), cert. denied, 429 U.S. 1002 (1976); *United States* v. *Knotts*, 662 F.2d 515, 517 n.2 (8th Cir. 1981), rev'd on other grounds, No. 81-1802 (Mar. 2, 1983); *United States* v. *Devorce*, 526 F. Supp. 191, 199-200 (D. Conn. 1981), aff'd *sub nom. United States* v. *Lombardo*, 697 F.2d 299 (2d Cir. 1982) (table), cert. denied, No. 82-5459 (Mar. 7, 1983).

In analogous contexts, courts have also held that no Fourth Amendment rights are infringed by the warrantless attachment of a beeper on property by an invitee (*United States* v. *Arredondo-Morales*, 624 F.2d 681, 684-685 (5th Cir. 1980); *United States* v. *Conroy*, 589 F.2d 1258, 1264 (5th Cir.), cert. denied, 444 U.S. 831 (1979)), or by the installation of a beeper on the exterior of a car or airplane parked in a location accessible to the public (*United States* v. *Michael*, 645 F.2d 252, 258 (5th Cir.) (en banc), cert. denied, 454 U.S. 950 (1981); *United States* v. *Shovea*, 580 F.2d 1382, 1388 (10th Cir. 1978), cert. denied, 440 U.S. 908 (1979); *United States* v. *Moore*, 562 F.2d 106, 111-112 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978); *United States* v. *Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976)).

Where it is necessary for agents to enter private premises surreptitiously to install or repair a beeper, however, the Fourth Amendment of course requires the entry to be authorized by a warrant. See *Dalia* v. *United States*, 441 U.S. 238, 246-248 (1979). But the requirement of a warrant in such circumstances has nothing to do with the physical act of installing a beeper, or with the nature of the information disclosed by the beeper if and when it is subsequently monitored. Instead, a warrant is required because any entry by police into a home or similar private premises—regardless of the purpose for that entry—necessarily involves a search of an area in which an individual has a legitimate expectation of privacy. See *Payton* v. *New York*, 445 U.S. 573 (1980).

was the property of the DEA and the ether was the property of Muehlenweg. At that time, the DEA and Muehlenweg presumably could do with the can and ether whatever they liked without violating Karo's rights" (Pet. App. 7a). The court held, however, that "regardless of the consent obtained when the beeper is physically installed, an infringement of the new owner's Fourth Amendment rights begins at the time the object comes into his control" (*id.* at 8a (footnote omitted)). In so holding, the court observed that "[t]he installation of a beeper on an item of personal property gives the government the capability of tracing every movement of the object on which the beeper is placed," and it expressed the belief that "individuals have a reasonable and legitimate expectation that the government will not engage in such activity without the protections afforded by resort to the judicial process" (*id.* at 7a-8a).

The court of appeals' holding is plainly incorrect. As is evident from the court's own discussion of the installation issue, the intrusion, if any, into legitimate expectations of privacy occasioned by beeper surveillance occurs when a beeper is *monitored* to ascertain the location of the container in which it has been installed. Unless the beeper is activated and its signals monitored, the beeper tells nothing about the whereabouts of the container. Thus, even after the transfer of a beeper-laden container to a new owner, the continued presence of the beeper, standing alone, cannot be said to effect any intrusion into the new owner's legitimate expectations of privacy. Perhaps the beeper's continued presence after transfer of the container to a new owner constitutes a technical trespass, but, as this Court recently concluded in *Knotts* (slip op. 9), such "notions of physical trespass based on the

law of rea' property" are not dispositive in this context. On the contrary, "the Fourth Amendment's reach 'cannot turn upon the presence or absence of a physical intrusion into any given enclosure.'" *Knotts*, slip op. 4 (quoting from *Katz* v. *United States*, 389 U.S. 347, 353 (1967)). See *Hester* v. *United States*, 265 U.S. 57 (1924). In short, although the court of appeals was correct in its observation that the installation of a beeper provides the authorities with the "capability" of monitoring the movements of a container and of persons possessing the container—just as the possession of a crowbar provides them with the capability of breaking down the doors of a house—the fact remains that, unless that capability is actually utilized, there can be no colorable claim that Fourth Amendment interests are implicated. Indeed, under *Knotts*, even if a beeper's signals are monitored, that monitoring ordinarily will not implicate Fourth Amendment concerns.[7]

The court of appeals sought to justify its holding by analogy to a previous owner of a suitcase consenting to subsequent searches of the suitcase (Pet. App. 8a-9a). This analogy is entirely inapposite. An owner of a container such as a suitcase ordinarily has a legitimate expectation of privacy in the contents of the container, and a search of the container would clearly intrude upon those privacy expectations even if the container's previous owner had consented to a subsequent search. By contrast, a beeper discloses no

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[7] Thus, the court of appeals' reference (Pet. App. 7a-8a) to an individual's "reasonable and legitimate expectation" that the government will not install and monitor beepers "without the protections afforded by resort to the judicial process" simply begs the question whether the individual's legitimate privacy expectations have been infringed by such actions.

information about the container's contents that was not already known to the agents when the beeper was installed, and it discloses nothing about what a third party might have taken from or placed into the container after it came into his possession. Cf. *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983). Indeed, the beeper discloses nothing at all unless it is monitored, and even then, it discloses only the present location of the container. As the Court held in *Knotts*, however, there is no legitimate expectation of privacy with respect to this information, at least where—as is usually the case—the container's location could have been ascertained by visual surveillance.

Here, respondent Karo certainly had no greater privacy interest in the location of the container than did the defendant in *Knotts*. There, the beeper was used to ascertain the arrival of a can of chemicals on the defendant's premises. Because this same information could have been obtained through constant visual surveillance, the Court concluded that the use of the beeper did not implicate Fourth Amendment concerns. In this case, insofar as respondent Karo is concerned, the beeper revealed only that Karo transported the container of ether in Muehlenweg's automobile from Muehlenweg's residence to his own home. As was the case in *Knotts*, this same information could have been obtained by direct visual surveillance. Moreover, as the court of appeals itself acknowledged (Pet. App. 13a), Karo could not establish a legitimate expectation of privacy in the locations at which the beeper was monitored after it left his house, including the Taos residence where the warrant-authorized search uncovered an illicit drug manufacturing laboratory. The court nevertheless concluded that Karo could move to suppress the evidence seized from that

residence by virtue of his challenge to the installation of the beeper (*id.* at 14a; see also *id.* at 6a n.1).

Under the ruling below, therefore, even where a defendant's legitimate expectations of privacy have not been infringed by beeper monitoring, the defendant may still object to the use of the beeper by challenging its installation. If this Court accepts that view, the result would be to subject every instance of beeper surveillance to regulation under the Fourth Amendment. As a consequence, the decision in *Knotts* would be a dead letter except in those cases in which the defendant's lawyer fails to object to installation of the beeper.

II. THE MONITORING OF THE BEEPER DID NOT VIOLATE THE FOURTH AMENDMENT

A. The Monitoring Of The Beeper Was Not a Search Or Seizure

As this Court made clear in *Knotts*, not all surveillance techniques employed by the police implicate Fourth Amendment concerns. In holding that the beeper monitoring in that case did not constitute a search or seizure, the Court analogized the use of the beeper to the use of the searchlight in *United States* v. *Lee*, 274 U.S. 559 (1927), and to the use of the pen register in *Smith* v. *Maryland*, *supra*. *Knotts*, slip op. 6-7. Responding to Knotts' claim that the beeper surveillance violated the privacy interests he enjoyed in his residence, the Court pointed out that the beeper furnished the officers with no more information about the container's location than they could have obtained through visual observation of Petschen's automobile arriving on Knotts's property. The beeper's use therefore "raise[d] no constitutional issues which visual surveillance would not also raise." *Id.* at 9.

Under the teaching of *Knotts*, the use of a beeper to monitor the movement of a container from one location to another does not disclose information as to which there is a legitimate expectation of privacy, even though each location may itself be private premises, because the actual movement—which is all that the beeper reveals—takes place over public roads and thus is subject to discovery through visual surveillance. The fact that the agents may have relied on the beeper rather than on visual surveillance to acquire that information "does not alter the situation." *Knotts*, slip op. 6. By exposing his activities to public view, an individual assumes the risk that those activities will be observed by, or reported to, the police. Whether the Fourth Amendment applies when a beeper is used to monitor those activities does not turn on the fortuity of someone actually seeing the individual's movements. The point is that the individual could not reasonably have expected that his movements would not be detected. See *Smith* v. *Maryland*, 442 U.S. at 744-745.

Moreover, the information revealed by a beeper—that the container to which it is attached has arrived at a particular location—is the same regardless of whether the beeper is broadcasting its signals from a position inside the premises (as here) or outside the premises (as in *Knotts*).[8] In this regard, we note

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[8] Although the Court in *Knotts* intimated (slip op. 6, 9) that the beeper-laden container was situated outside Knotts' cabin at the time its signals were monitored, the record in that case did not actually reflect the precise location of the container at the time of the monitoring (see *id.* at 1) (Stevens, J., concurring). The container was discovered under a barrel outside the cabin during a search of the premises three days after the monitoring (*id.* at 3), but the monitoring itself

that a beeper is merely a radio transmitter that emits signals that can be picked up by a receiver. See *Knotts*, slip op. 1. When monitored from a distance, a beeper is not capable of disclosing its exact location. By monitoring the direction from which a beeper's signals are coming, agents can ascertain that the beeper is located somewhere in or around a particular structure or vehicle, but in the usual case they cannot determine its precise resting place without exposing themselves to detection. Thus, as a practical matter, a beeper ordinarily does not even disclose whether it has been taken inside a residence.[9] And, even if the agents are able, through monitoring, to discover that a beeper is located inside certain premises, the beeper itself tells nothing about the interior of the premises into which it has been taken other than the fact that it is there.[10] Because, under *Knotts*, respondents had

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disclosed only that the beeper was broadcasting from somewhere on Knotts' property. See 81-1802 Gov't Br. 26-27 & n.14.

[9] This point is illustrated by Agent Rottinger's affidavit supporting the search warrant for the Taos residence. In the affidavit, Agent Rottinger stated that by monitoring the beeper, the agents were able to determine only that the can of ether was "at or in the immediate vicinity of" certain residences (J.A. 54; see also J.A. 56-57). Similarly, at each of the two storage locker facilities, the beeper did not by itself enable the agents to determine which locker contained the ether (J.A. 55-56). The only occasion on which the use of the beeper disclosed that the ether was inside private premises was during the surveillance of the Taos residence (J.A. 57-58).

[10] In some cases, law enforcement officials have employed a beeper that transmits not only its location but also the fact that the package in which it has been installed has been opened, an event signaled by a change in the beeper's tone. See *United States* v. *Sheikh*, 654 F.2d 1057, 1071 (5th Cir.

no legitimate privacy expectations with respect to the arrival of the container at any particular location, it is immaterial that the beeper may actually have been situated inside private residences or storage lockers at the times its signals were monitored. The information gained by use of the beeper in this case—where the ether had been taken—was precisely the same as that gained in *Knotts*, and the two cases are therefore analytically indistinguishable.[11]

The court of appeals' contrary ruling serves no interest protected by the Fourth Amendment. The court appears to have acknowledged, albeit reluctantly, that under *Knotts* monitoring of the beeper to track the movements of the can of ether as it was being transported from place to place by respondents did not implicate the Fourth Amendment (Pet. App. 11a). Nevertheless, because the can happened to be located inside rather than outside private premises when its signals were monitored, the court held that the monitoring was transformed into a search. But given the

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1981), cert. denied, 455 U.S. 991 (1982); *United States* v. *Dubrofsky*, 581 F.2d 208 (9th Cir. 1978). Because the beeper involved in this case did not convey this information (and, so far as we know, did not have the capacity to do so), it is not necessary for the Court to consider any distinct Fourth Amendment implications that may relate to monitoring such a beeper. We note, however, our view that even if the use of such a device may be considered a search or seizure for Fourth Amendment purposes, the warrant requirement should not be applicable because the "search" is so limited in scope. See pages 31-46, *infra*.

[11] Like *Knotts*, this case does not involve the use of a beeper to monitor the movement of the container from place to place *within* private premises. Use of a beeper for that purpose would provide at least an arguable basis, absent here, for distinguishing *Knotts*.

limited information conveyed by a beeper and the limited uses to which such information may be put, it is wholly arbitrary to differentiate for constitutional purposes between beeper signals that emanate from inside rather than from outside private premises. Not only is it true, as noted above, that the beeper does not disclose anything about the interior of the premises (except that it is there), but it is of no additional value to the agents to discover that the beeper is inside, as opposed to outside, those premises. For example, here, as was the case in *Knotts*, the agents were concerned with tracing the movements of the chemicals to ascertain their ultimate destination. In accomplishing that task, the value of the information conveyed by the beeper—*viz.*, its presence at a particular location—is precisely the same, regardless whether the beeper is broadcasting from a position directly inside or outside the front door of a house. Thus, here as in *Knotts*, the mere fact that the beeper may have been physically "trespassing" on respondents' property at the time its signals were monitored does not convert the agents' actions in monitoring those signals into a search or seizure. See pages 20-21, *supra*. Accordingly, the court of appeals' attempt (Pet. App. 9a-10a) to distinguish *Knotts* on the ground that here the beeper was monitored while it was inside certain private premises falls of its own weight.[12]

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[12] The court of appeals expressed the view (Pet. App. 9a) that, because the beeper was monitored while the container was within private residences and storage lockers, it provided the agents with information that could not have been discovered even by constant visual surveillance. But the only information that the monitoring provided was the location to which the container had been taken, and that information could

The court of appeals also sought to distinguish *Knotts* by pointing to the length of the beeper sur-

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very well have been ascertained by constant visual surveillance. To be sure, it is theoretically possible that a five-gallon can in which a beeper has been installed could be taken inside private premises, where it could be replaced by, or concealed within, another container or transferred to a vehicle before being taken to another location. However, such "shell-game" maneuvers would not necessarily defeat visual surveillance. The authorities could undertake surveillance of any suspicious container that is removed from the premises and follow it to its next location, and they could follow any vehicle leaving the premises.

Particularly in a case such as this, where the container in question is one of a substantial number of large drums of chemicals that are in all likelihood destined for a single clandestine drug laboratory, constant visual surveillance would probably prove fruitful. We note that there is no indication in this case that anything was done with the ether that would have prevented the agents from monitoring its movements from one location to another by visual surveillance (except for the risk that close visual surveillance could more easily be detected by the suspects). In fact, the record suggests just the opposite. For instance, the agents monitoring the closed circuit video camera at the second storage locker had no difficulty observing Rhodes and an unidentified woman remove the ten five-gallon cans of ether and load them into a pickup truck, which the agents then followed to Rhodes's residence. From there, the agents followed the truck to the Taos residence. These circumstances suggest that respondents' actions in transporting the ether to various locations were open to public view and could have been ascertained by constant visual surveillance.

This type of surveillance would certainly have been far less efficient (and perhaps more dangerous) than using a beeper in tracking the movements of the ether, but, as the Court in *Knotts* pointedly observed, respondents have no constitutional basis for complaint that "scientific devices such as the beeper enabled the police to be more effective in detecting crime * * *. We have never equated police efficiency with unconstitutionality" (slip op. 8).

veillance in this case (five months) and the facts that the agents lost track of the ether "for significant periods of time" and for the most part were able to track the ether to new locations only by use of the beeper (Pet. App. 10a). But these differences in circumstances do not suggest that the beeper surveillance in this case invaded any legitimate expectations of privacy. The length of time a beeper is monitored should have no bearing on the applicability of the Fourth Amendment because the limited nature of the information revealed by the monitoring is not affected by its duration. Thus, whether the monitoring takes place over one day or several months, the only information revealed by a beeper is its present location.[13]

Similarly, the fact that the agents often had to rely on the beeper during the period of surveillance to ascertain the location of the ether is of no moment. In *Knotts* the Court observed (slip op. 9) that, "because of the failure of the visual surveillance, the beeper enabled the law enforcement officials * * * to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise." The Court went on to observe that, by using visual surveillance techniques, the officers "could have" followed the chemicals to their destination on private property. Likewise, the agents in this case could have used

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[13] As counter-surveillance techniques employed by drug rings become more sophisticated, the period of beeper surveillance is likely to increase. See pages 43-44, *infra*. But the nature of the information revealed by the beeper on the 50th day of surveillance (its present location) is the same as that revealed on the first day.

visual surveillance methods to track the chemicals to their ultimate destination in Taos. See note 12, *supra*. As *Knotts* teaches, the fact that the use of the beeper provided a much safer and more efficient means of surveillance and substantially diminished the law enforcement resources that otherwise would have had to have been expended to trace the chemicals has no constitutional implications.

Even if there were circumstances in which the monitoring of a beeper after it has been taken inside a private residence somehow provided information that could not have been obtained through visual surveillance, that would not convert the beeper surveillance into a "search" within the meaning of the Fourth Amendment. The monitoring of a beeper in these circumstances is no more intrusive than a "canine sniff" of personal luggage by a narcotics detection dog, which this Court has held does not raise Fourth Amendment concerns. *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 10-11. The Court in *Place* noted that, although "the sniff tells the authorities something about the contents of the luggage"—that is, whether or not it contains contraband drugs—"the information obtained is limited" (slip op. 11). By comparison, the monitoring of a beeper located inside a residence reveals the presence of the beeper, but "[i]t reveals nothing more about the contents of, or activities in, the residence." *United States* v. *Brock*, 667 F.2d 1311, 1321 (9th Cir. 1982), cert. denied, No. 81-6922 (Mar. 7, 1983).

Similarly, in *Illinois* v. *Andreas*, *supra*, this Court held that where the police have lawfully opened a container and identified its contents as illegal, a subsequent reopening of that container following a con-

trolled delivery does not intrude on legitimate privacy interests, and thus is not a search under the Fourth Amendment, unless there is a "substantial likelihood" that the contents of the container have been changed during any gap in the surveillance. In reaching this result, the Court recognized that it is not unusual for police to lose sight of the container while seeking to avoid detection, and that "[d]uring such a gap in surveillance, it is possible that the container will be put to other uses—for example, the contraband may be removed or other items may be placed inside" (slip op. 6-7). The Court nevertheless concluded that "it would be absurd to recognize as legitimate an expectation of privacy where there is only a minimal probability that the contents of a particular container had been changed" (slip op. 7). Here, too, we submit, there is no reasonable basis for recognizing as legitimate an expectation of privacy in the mere location of a container—information that would often, if not always, be discoverable through visual surveillance of public areas.

B. Even If The Monitoring Of The Beeper Was A Search Or Seizure, The Fourth Amendment Standard of Reasonableness Was Satisfied

1. The use of a beeper is "reasonable" for Fourth Amendment purposes if it is based on a reasonable suspicion of criminal activity

We have argued in the preceding point that as a matter of logic and precedent, the use of a beeper that occurred in this case is analytically indistinguishable from the use in *Knotts*, with the result that there was here no search or seizure regulated by the Fourth Amendment. If this is correct, it would mean that the Fourth Amendment does not proscribe even

random or suspicionless use of beepers to track containers of chemicals as they are moved about from one location to another. As a practical matter, however, law enforcement agencies do not use beepers in such circumstances, but only when they have some reason to believe that unlawful activity is afoot and that a beeper will help in the effective investigation of their suspicions. What is of practical importance, therefore, is the quantum of suspicion that will be required before beeper surveillance techniques may be utilized. If the court of appeals is correct in requiring a warrant, a necessary correlative of that conclusion is that probable cause is a prerequisite to beeper use; but just as visual surveillance is an important aid to the early stages of an investigation, at a time when officers may possess suspicion falling short of probable cause, so too beepers can be of inestimable value in developing probable cause. Accordingly, as we now show, it is not reasonable to require probable cause as a prerequisite to the use of beepers.

Since *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court has recognized, in a variety of situations, that certain law enforcement actions that qualify as Fourth Amendment searches or seizures are nevertheless not so intrusive as to require probable cause. In *Terry* itself, the Court noted that a policeman who stops a person on the street and frisks him for weapons has undoubtedly effected a "seizure" and "search" of that person within the purview of the Fourth Amendment.[14] However, because "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (392 U.S. at 19), the Court concluded that a stop and frisk, which is considerably less intrusive than a full-blown arrest and search of a person, may be undertaken on less than probable cause, although the facts known to the officer must at least support a reasonable inference of unlawful activity and, for the frisk, that the person may be armed.

In subsequent cases, the Court has continued to recognize that there are various types of police activities of limited intrusiveness that need not be justified by probable cause. For example, in *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554-555 (1976) (citations omitted), the Court stated:

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[14] As the Court in *Terry* explained (392 U.S. at 16):

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search."

> The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. * * * In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual * * *.

In upholding the routine stopping of vehicles at fixed checkpoints and the detention of some of them for several minutes in the absence even of individualized suspicion, the Court in *Martinez-Fuerte* concluded that the government's substantial interest in operating such checkpoints in order to control the flow of illegal aliens outweighed the limited intrusion on the Fourth Amendment interests of the motoring public occasioned by stopping a vehicle, briefly questioning its occupants, and inspecting the parts of the vehicle that can be seen without a search. See also *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983).

The Court followed a similar approach in three cases decided last Term. In *United States* v. *Place*, *supra*, the Court held that an officer may detain a traveller's luggage on reasonable suspicion that it contains narcotics, provided that the detention is brief and limited in scope. In upholding the permissibility of this practice, the Court noted that some luggage detentions "may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime" (slip op. 10). In addition, the Court in *Michigan* v. *Long*, No. 82-256 (July 6, 1983), upheld a limited protective search of an automobile for weapons dur-

ing a lawful stop of the automobile, concluding that such a search, if based on a reasonable suspicion that the suspect is dangerous and may gain immediate control of weapons, is justified by the strong interest in protecting the police and others from violence in the course of automobile stops. Finally, in *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), the Court upheld suspicionless boardings of vessels by Customs officers for the purpose of inspecting the vessels' documentation. In so doing, the Court emphasized (slip op. 13 (footnote and citations omitted)):

> While the need to make document checks is great, the resultant intrusion on Fourth Amendment interest is quite limited. While it does intrude on one's ability to make "free passage without interruption," * * * it involves only a brief detention where officials come on board, visit public areas of the vessel, and inspect documents. * * * "Neither the [vessel] nor its occupants are searched, and visual inspection of the [vessel] is limited to what can be seen without a search." * * * Any interference with interests protected by the Fourth Amendment is, of course, intrusive to some degree. But in this case, the interference created only a modest intrusion.

Likewise, in a case where the monitoring of a beeper is undertaken, as it was here, to uncover a clandestine drug laboratory, the government interest outweighs the minimal intrusion, if any, into an individual's legitimate privacy interests. There can be little doubt that the government interest served by the beeper surveillance in this case was, at the very least, substantial. As Justice Powell observed in his concurring opinion in *United States* v. *Mendenhall*, 446 U.S. 544, 561-562 (1980):

> The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of enforcement.

See also *Place*, slip op. 7.

As a practical matter, the difficulties of law enforcement are particularly acute in the context of unlawful drug manufacturing ventures. Because ingredients and equipment may be purchased legally, the only effective means of apprehension before the unlawful drug is distributed is to locate the drug laboratory. As the facts of this case nicely illustrate, discovery of a clandestine drug laboratory is a task requiring considerable police organization and ingenuity. Even with the indispensable help of the beeper, the surveillance in this case involved a substantial expenditure of law enforcement resources, including the use of a number of agents, an entry tone alarm, a closed circuit video camera and monitor, an aircraft and several land vehicles (J.A. 78-84, 86-88, 92-93).

At the same time, as already noted, the use of a beeper constitutes a limited intrusion, if any, on legitimate privacy interests. A beeper does not conduct either a visual or aural search of the place into which it is taken. Even when taken inside a house, a beeper gives out one piece of information and one piece of information only: "Here I am."

The facts of this case underscore the limited information that a beeper conveys. Here, the agents used the beeper to trace the ether to residences and storage lockers and finally to the clandestine drug laboratory in Taos. The beeper disclosed no information about respondents' activities inside their residences, and the information it did disclose—about respondents' actions in transporting the ether from place to place—could also have been obtained (albeit less efficiently) by means of continuous visual surveillance. Thus, the monitoring of the beeper interfered minimally, if at all, with respondents' legitimate expectations of privacy.

Because the substantial societal concern with drug enforcement outweighs the limited Fourth Amendment privacy interests that arguably are implicated by beeper surveillance, use of a beeper as an investigative tool to locate a source of illegal drugs is fully justified on the basis of reasonable suspicion that criminal activity is afoot. In a similar situation, a plurality of the en banc Fifth Circuit concluded, in *United States* v. *Michael*, 645 F.2d 252, cert. denied, 454 U.S. 950 (1981), that reasonable suspicion was sufficient to justify the monitoring of a beeper to locate a clandestine drug laboratory by tracking the movements of an automobile driven by the defendant. In reaching this result, the plurality

> consider[ed] the governmental interest in eliminating illegal drug manufacture to be a persuasive reason to permit this minimally intrusive practice. An "intermediate response" based on something less than probable cause, is a proper investigatory tool to aid DEA agents in discovering and eliminating clandestine laboratory operations. In balancing the public concerns served by the use of the beeper to discover Michael's drug manufacturing apparatus against

> the slight infringement of Michael's expectation of privacy, we find the beeper's use to be eminently reasonable.

645 F.2d at 259 (footnotes omitted).

In short, because beepers convey sharply limited information about matters that can be deemed private only in the most theoretical sense, their use poses little, if any, threat to legitimate Fourth Amendment interests. Accordingly, the reasonableness requirement of the Fourth Amendment is not served by imposing upon beeper surveillance the same requirement of probable cause as is imposed on conventional searches that by their nature reveal private matter to official eyes.

2. The use of a beeper should in any event not require a warrant

As we have shown, a balancing of the pertinent government and individual interests supports the conclusion that beeper surveillance may be undertaken if the authorities reasonably suspect that criminal activity is afoot. If reasonable suspicion is sufficient to justify use of a beeper, it follows that a warrant, which may be issued only on probable cause, is not required under the Fourth Amendment. But even if probable cause is required, the monitoring of a beeper should not require a warrant.

Here, the agents had probable cause to believe that a crime was being committed and that evidence concerning that offense would be obtained through use of the beeper. The agents knew that Muehlenweg had previously procured laboratory equipment and chemicals used to manufacture amphetamine for Richard Logan, a suspected drug offender. In addition, Muehlenweg told the agents that he had pre-

viously ordered ether for respondents Karo, Horton, and Harley for use in the production of cocaine. When Muehlenweg informed the agents that he had ordered another shipment of ether for use by those individuals in their illicit drug venture, the agents confirmed that that order had been placed. These facts clearly provided the agents with probable cause to believe that Karo, Horton, and Harley were engaged in an unlawful narcotics scheme. The facts also justified the belief that the use of the beeper would uncover evidence of the scheme, because it was highly likely that the ether would ultimately be transported to a clandestine laboratory where other possible participants in the conspiracy might be present. In these circumstances, use of the beeper to help uncover the location of the laboratory and identify other participants was a perfectly reasonable investigative technique.

The court of appeals did not question the existence of probable cause in this case. Instead, the court held that respondents' Fourth Amendment rights had been violated because the agents failed to obtain a valid warrant authorizing the use of the beeper. Although the court held (as regards the monitoring issue) that law enforcement agents are required to obtain a warrant before they monitor a beeper only if it has been taken inside private premises, for all practical purposes the court's holding will force agents to obtain warrants in every beeper case, because they have no way of knowing in advance whether or not the beeper will be broadcasting its signals from inside private premises at any point during the surveillance.

The court of appeals erred in its imposition of a warrant requirement. Although this Court has stated

in a variety of contexts that a warrant is presumptively required before a search of private property may be deemed reasonable under the Fourth Amendment, the warrant requirement is not absolute. Exceptions have been recognized "where it was concluded that the public interest required some flexibility in the application of the general rule," particularly where "the societal costs of obtaining a warrant * * * outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas* v. *Sanders*, 442 U.S. 753, 759 (1979).

In our view, the issue whether a particular search must be supported by a warrant in order to meet the Fourth Amendment's standard of reasonableness cannot be decided without taking into account the magnitude of the individual privacy interest invaded by the search. This point may be illustrated by examining this Court's decisions recognizing the so-called "automobile search" exception to the warrant requirement. Although the Court has relied on exigent circumstances to justify warrantless probable cause searches of automobiles stopped along the highway, the Court has also upheld car searches in the absence of any exigencies, based on the owner's diminished expectation of privacy in his automobile. See *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion); *Chambers* v. *Maroney*, 399 U.S. 42 (1970). Given the extremely limited intrusion into legitimate privacy interests entailed by the monitoring of a beeper, an intrusion that is much narrower than that involved in a search of the private areas of an automobile, we submit that the reasonableness of such monitoring should not turn on whether it was authorized by a warrant.

Traditionally, a warrant has been described as serving three basic functions. First, "[i]ts protection consists in requiring that * * * inferences [from evidence relied upon to establish probable cause for a search] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948) (footnote omitted). Second, a warrant serves to define the scope of the search, limiting it to bounds commensurate with the probable cause underlying its issuance. *United States* v. *Chadwick*, 433 U.S. at 9. Third, the presence of a warrant serves to assure persons subjected to a search "of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Ibid.* See *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967).

These policies have little, if any, application to the monitoring of signals from a beeper attached to a package of chemicals that are likely to be used to manufacture illegal drugs. To begin with, the notice function of the warrant is inapposite because beeper surveillance cannot be effective unless it is carried out surreptitiously, without the knowledge of the person or persons transporting the package.[15] In addition, a warrant cannot serve to define the scope of the search;

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[15] In the case of electronic eavesdropping, which involves a far greater intrusion into privacy interests than the use of a beeper, this Court has recognized that even though a warrant is required, interception of conversations may be undertaken without advance notice because otherwise the whole purpose of the interception would be defeated. See *Katz* v. *United States*, 389 U.S. at 355 n.16; *Dalia* v. *United States*, 441 U.S. at 247-248.

any search or seizure effected by the use of a beeper is inherently limited in scope to a single piece of information. Moreover, it is impossible to restrict the agents in advance to monitoring the beeper's signals from only certain specified locations, because when beeper surveillance is instituted it is not known where the container will be taken.[16] It is thus ordinarily impossible to obtain a warrant that satisfies the requirement of the Fourth Amendment that the "place" to be "searched" be particularized. The agents will almost never have probable cause to believe that the beeper will broadcast from any given location; the whole purpose for undertaking this type of surveillance is to locate the beeper's unknown destination.[17]

It is true that a beeper warrant could serve to limit the period of authorized surveillance, and, in fact, the Sixth Circuit has held not only that beeper sur-surveillance must be authorized by a warrant, but that a beeper warrant that "places no time limit on the search or seizure it purports to authorize is invalid." *United States* v. *Bailey*, 628 F.2d 938, 945 (1980). See also *United States* v. *Cassity*, 720 F.2d 451 (6th Cir. 1983), petition for cert. pending, No. 83-1393 (filed Feb. 21, 1984). The court in *Bailey* reasoned that the Fourth Amendment requires a showing "of *present* probable cause" (628 F.2d at

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[16] Indeed, each time the beeper's signals are monitored, the agents do not know ahead of time whether those signals will be emanating from inside or outside private premises.

[17] Of course, if, as a result of the beeper surveillance, the agents decide to conduct a traditional search of any private premises, they must obtain a valid warrant authorizing such a search. Here, the agents obtained a warrant authorizing a search of the Taos residence.

945 (emphasis in original)), and suggested that information justifying the institution of beeper surveillance might become stale over time. In addition, the court expressed the view that "[u]nless the warrant contains a time limit, it cannot assure the reasonableness of the search it purports to authorize" and is therefore invalid under the Fourth Amendment (628 F.2d at 945).

The reasoning of the Sixth Circuit in *Bailey* completely overlooks the significant differences between beeper surveillance and traditional searches and seizures. As we have already pointed out, the information disclosed by a beeper—its own location—is extremely limited in scope and does not change over time. Of course the location in which the chemicals are stored may, and typically does, change over time as the conspirators employ counter-surveillance methods, but the beeper still discloses only the single piece of information as to its location. In contrast to a conventional search for contraband or other evidence at a location that can be identified to the magistrate in advance, as to which the concept of staleness has obvious relevance, the sole purpose of beeper monitoring is to keep track of the location of the container, a matter as to which staleness concepts have little utility.

Furthermore, as the facts of this case illustrate, in addition to moving chemicals and equipment to different locations to avoid detection, drug manufacturers characteristically hold on to the chemicals and equipment for a considerable but unpredictable length of time before commencing their illicit manufacturing operations.[18] (These tactics are designed to reduce the

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[18] See, *e.g.*, *United States* v. *Cassity*, 720 F.2d at 454; *United States* v. *Taylor*, 716 F.2d 701, 704 (9th Cir. 1983); *United*

risk of effective visual surveillance and also tend to impair beeper surveillance, because a beeper's batteries wear out over time.[19]) Given these facts, and the additional fact that a traditional search warrant —based on a showing of current probable cause—must ordinarily be procured before the agents may conduct an actual search of the premises to which the beeper has been traced, a time limitation for beeper surveillance (imposed by way of a beeper warrant requirement) would serve no meaningful function.

Beyond this, the benefits of interposing a neutral magistrate to determine whether justification for a search or seizure exists in a given case cannot be isolated from consideration of the degree of intrusion into protected privacy interests occasioned by the proposed law enforcement action. An officer who searches a house or taps a telephone without probable cause has intruded unjustifiably into an area to which our society attaches strong privacy interests, causing a grave and largely irreparable injury. If the pro-

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States v. *Braithwaite*, 709 F.2d 1450, 1452 (11th Cir. 1983); *United States* v. *Bentley*, 706 F.2d 1498, 1502 (8th Cir. 1983); *United States* v. *Ellery*, 678 F.2d 674, 676 (7th Cir. 1982), cert. denied, 459 U.S. 868 (1982); *United States* v. *Dunn*, 674 F.2d 1093, 1096 (5th Cir. 1982); *United States* v. *Brock*, 667 F.2d at 1314; *United States* v. *Bailey*, 628 F.2d at 939; *United States* v. *Noll*, 600 F.2d 1123, 1125 (5th Cir. 1979); *United States* v. *Clayborne*, 584 F.2d 346, 348 (10th Cir. 1978); *United States* v. *Bernard*, 623 F.2d at 553-554 & n.5; *United States* v. *Hufford*, 539 F.2d at 33; *United States* v. *Stephenson*, 490 F. Supp. 619, 620-621 (E.D. Mich. 1979).

[19] On occasion, DEA agents have obtained judicial authorization to enter private premises for the purpose of replacing a beeper's worn out batteries. See, *e.g.*, *United States* v. *Bailey*, 628 F.2d at 939. We agree that the Fourth Amendment imposes a warrant requirement for such entries. See page 19, note 6, *supra*.

phylaxis of a warrant requirement avoids even a relatively small number of unreasonable searches of this nature, the personal security of the citizenry will have been meaningfully advanced. The same cannot be said in the context of beeper surveillance, because in the typical beeper case the information conveyed by the beeper—that a vehicle or a package whose contents are known to the authorities has arrived or is situated at a particular location—could have been obtained through direct visual surveillance without any intrusion into legitimate privacy interests. Even if the use of a beeper might be said in some instances to intrude to some extent upon cognizable Fourth Amendment privacy interests, that slight intrusion " 'is abstract and theoretical' " (*Cardwell* v. *Lewis*, 417 U.S. at 592 (plurality opinion), quoting *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974)) and is simply not comparable to the intrusions occasioned by searches and seizures that have been required to be authorized by warrant. It can be adequately controlled, and abuses deterred, by the availability of post-search judicial review.

On the other hand, requiring procurement of a warrant to achieve the marginal benefits of antecedent judicial control of these limited intrusions in the case of a beeper or a similar enhancement device would entail significant costs. A warrant requirement would necessitate compliance with various procedural technicalities unrelated to the question of probable cause. Accordingly, there exists the danger—one that was actually realized in *Bailey* and other cases—that the agents' expenditure of considerable investigative resources to develop probable cause might go for naught because of an inadvertent failure to observe some procedural technicality associated with the warrant requirement. Moreover, requiring a warrant in this

setting would trivialize the Warrant Clause of the Fourth Amendment and dilute the effectiveness of the warrant procedure itself. As Professor LaFave has stated:

> Use of the warrant process to deal with police practices which present only a "minor peril to Fourth Amendment protections," it could well be argued, would tend to downgrade that process and thus might tempt magistrates to be less cautious in exercising their warrant-issuing authority. That is, it may well be that, as a practical matter, the warrant process can best serve as a meaningful device for the protection of Fourth Amendment rights if it is used somewhat selectively to prevent those police practices which would be most destructive of Fourth Amendment values.

1 W. LaFave, *Search and Seizure* § 2.2, at 290 (1978) (footnotes omitted).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

VINCENT L. GAMBALE
Attorney

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